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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

SALVADOR REAL GARCIA,

Defendant and Appellant.

C062368

(Super. Ct. No.
08F07638)

Defendant Salvador Real Garcia entered a plea of no contest to vehicle theft (Veh. Code, § 10851, subd. (a)—count one); providing false information to an officer, a misdemeanor (Pen. Code, § 148.9, subd. (a)—count two); and obstructing an officer in the discharge of his duties, a misdemeanor (Pen. Code, § 148, subd. (a)(1)—count three). Defendant entered his plea with the understanding that if the court found a strike prior allegation (Pen. Code, §§ 667, subds. (b)-(i), 1170.12; all further statutory references are to the Penal Code) to be true, that is, qualified as a strike prior, the sentence would be an aggregate term of 32 months in state prison, but if the court found the strike prior allegation not to be true, then the matter would be referred to probation.

The court found that defendant's 1997 conviction for exhibiting a firearm while in an occupied vehicle (§ 417.3) qualified as a strike prior in that defendant personally used a firearm.¹ The court denied defendant's motion to strike the strike prior and sentenced defendant to state prison for an aggregate term of 32 months.

Defendant appeals. He contends that insufficient evidence supports the trial court's finding that his prior conviction qualified as a strike prior because the offense is not listed in section 1192.7, nor does the record of conviction establish that he personally used the firearm. We will affirm the judgment.

In reviewing the sufficiency of the evidence to support the trial court's finding that a prior conviction qualified as a strike prior, we review the entire record of conviction in the light most favorable to the finding to determine whether there is substantial evidence, that is, "whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067; see *People v. Towers* (2007) 150 Cal.App.4th 1273, 1277

¹ Section 417.3 provides, in relevant part, as follows: "Every person who, except in self-defense, in the presence of any other person who is an occupant of a motor vehicle proceeding on a public street or highway, draws or exhibits any firearm, whether loaded or unloaded, in a threatening manner against another person in such a way as to cause a reasonable person apprehension or fear of bodily harm is guilty of a felony"

(*Towers*); *People v. Rodriguez* (2004) 122 Cal.App.4th 121, 128-129.)

To meet its burden of proving beyond a reasonable doubt that defendant's prior conviction was a serious felony (*Towers, supra*, 150 Cal.App.4th at p. 1277), the prosecution presented the complaint, the minute order of proceedings, the January 23, 1997, reporter's transcript of the entry of defendant's plea, and the minute order of probation. The complaint charged defendant with two offenses, a violation of section 417.3 (count one) and a violation of section 12021, subdivision (a) (convicted felon in possession of a firearm—count two). There was no codefendant. At the entry of plea hearing in 1997, the prosecutor stated the factual basis as follows:

"On the date stated in the Complaint, in the County of Sacramento, the defendant had a firearm which he was exhibiting in a rude, angry, threatening manner, causing reasonable apprehension and fear to Tommy Stevenson, who was in a vehicle moving on a highway." Defense counsel confirmed that the People had "accurately summarized their evidence." Neither defendant nor his counsel had any comment or amendment when asked by the court.

After advising defendant of his rights and the consequences of his plea, and obtaining his waivers, the court stated, "[I]t's alleged on the 6th day of October, 1996, . . . you did violate Section 417.3 of the Penal Code, a felony, in that you did willfully and unlawfully, being a person not in self-defense, in the presence of Tommy Stevenson, . . . who was an

occupant of a motor vehicle on a public highway, you did willfully and unlawfully draw and exhibit a firearm in a threatening manner which would reasonably cause a person to be in apprehension and fear of bodily harm. To that charge, what is your plea?"² Defendant responded, "Guilty." Defendant entered his plea to count one in exchange for no state prison at the outset, with a maximum of 90 days in county jail as a condition of probation, and dismissal of count two.

Defense counsel presented no evidence to rebut the prosecutor's evidence that defendant's 1997 violation of section 417.3 qualified as a strike prior. Defense counsel argued the inquiry in 1997 was insufficient under *People v. Holmes* (2004) 32 Cal.4th 432 (*Holmes*)³ and *People v. French* (2008) 43 Cal.4th 36 (*French*).⁴

² The court read from the complaint, which charged: "The People of the State of California upon oath of the undersigned complain against the defendant above named for the crime of violation of Section 417.3 of the Penal Code, a felony, committed as follows: That on the 6th day of October, 1996, at and in the County of Sacramento, State of California, the defendant, SALVADOR REAL GARCIA, then and there before the filing of this complaint, was a person who, not in self-defense, in the presence of another person, to wit, TOMMY STEVENSON, who was an occupant of a motor vehicle on a public street and highway, did willfully and unlawfully draw and exhibit a firearm, whether loaded or unloaded, in a threatening manner which would cause a reasonable person apprehension and fear of bodily harm."

³ In taking a conditional plea and in order for section 1192.5 to apply, "the trial court must garner information regarding the factual basis either from the defendant or defense counsel. If the trial court examines the defendant regarding the factual basis for the plea, the court may have the defendant describe the conduct that gave rise to the charge [citation], or may

As the trial court determined, section 417.3 is not specifically listed as a serious felony (§ 1192.7, subd. (c)) or as a violent felony (§ 667.5, subd. (c)), but could be deemed a serious felony under section 1192.7, subdivision (c)(8) if defendant had personally used a firearm. If so, the offense would constitute a strike prior for purposes of sentencing under the "three strikes" law.

In concluding that the record of defendant's prior conviction established that the offense was a serious felony, the court stated:

"As previously indicated, reviewing the transcript of [defendant's] change of plea of January 23rd, 1997, I regurgitate what I said earlier, but in that change of plea the prosecutor stated a factual basis. When the Court asked counsel for defendant, 'Have the People accurately summarized their evidence,' obviously he's referencing the statement that the

question the defendant regarding the detailed factual basis described in the complaint or written plea agreement. [Citation.] If the trial court inquires of defense counsel regarding the factual basis, counsel may stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement." (*Holmes, supra*, 32 Cal.4th at pp. 438, 442.) *Holmes* was decided in 2004, after defendant entered his plea in 1997.

⁴ *French* concerned an aggravating circumstance (the defendant took advantage of a position of trust in committing the offense) that lacked a factual basis as to whether the person had care and custody of a child. (*French, supra*, 43 Cal.4th at pp. 50-51.)

district attorney just gave as a factual basis. 'Was that accurate?' The defense attorney said that it was.

"The Court actually took a plea of guilty from [defendant] by reading the language, I suppose, of the charging document, and he asked him if he specifically violated that section of the Penal Code, 417.3, in that he did 'willfully and unlawfully, being a person not in self-defense, in the presence of Tommy Stevenson, who was an occupant of a motor vehicle on a public highway, you did willfully and unlawfully draw and exhibit a firearm in a threatening manner, which would reasonably cause a person to be in apprehension and fear of bodily harm. To that [charge], what is your [plea],' and [defendant] answered 'Guilty.'

"The Court further found there to be a factual basis for the entry of the plea, which under the case cited by the defense, People v. Holmes, the requirement only under 1192.5 is that there be a prima facie factual basis for the charges. That's what I see Holmes standing for. So it certainly satisfies that statute.

"The question is whether or not that statement or statements contained within the change of plea transcript is sufficient for the Court to conclude beyond a reasonable doubt that [defendant] personally used a firearm. I find that it does.

"I find that, based on the statements that I alluded to last time that I just read, that it is sufficient evidence to convince this Court that he personally used that in the

commission of the 417.3. It's a personal use of a firearm. No indication it was as an aider and abettor. When the Court asked him directly to respond to the allegation, he said 'Guilty' clearly. If it was anything other than what the Court stated, he would have so stated. I do find that it is a serious felony under 1192.7(c), and it is a strike."

Defendant complains that when he entered his plea in 1997, he was not advised in the complaint or elsewhere that the offense would constitute a strike prior. As defendant recognizes, a lack of advisement in a prior proceeding does not mean the offense does not qualify as a strike prior in the current proceeding.

Defendant argues the record does not rule out whether he committed the offense in self-defense or defense of others, or whether he aided and abetted someone else. We disagree. The factual basis for his plea, to which neither defendant nor his counsel objected or added anything, and defendant's guilty plea when read the charge eliminated the possibility that the offense was committed in self-defense or defense of others, or that defendant aided and abetted another.

Defendant also argues that he would not be liable for personal use of a firearm if he displayed the firearm and unintentionally frightened the victim. Defendant entered a plea to willfully and unlawfully drawing and exhibiting a firearm in a threatening manner at a person in another vehicle which would reasonably cause a person to be in apprehension and fear of bodily harm. There is nothing unintentional about doing so.

"Section 417.3 defines a more restrictive standard of conduct than that required for simple brandishing (section 417, subdivision (a)(2))—i.e., threatening behavior which, in fact, causes fear or apprehension of harm. It seems illogical to elevate this more dangerous act to a felony simply because an occupied vehicle happens by. The obvious purpose of section 417.3 is to deter, and/or to punish more severely, substantially more dangerous conduct—threats to persons *inside* vehicles, which threats may well result in erratic driving endangering the safety of the innocent driving and pedestrian public." (*People v. Lara* (1996) 43 Cal.App.4th 1560, 1566.)

As in *People v. Sohal* (1997) 53 Cal.App.4th 911, the prosecutor's statement of the factual basis, with which defense counsel agreed, contained sufficient facts to support the trial court's finding that defendant personally used a firearm in committing the prior offense. (*Id.* at pp. 914, 916.) The prosecutor stated that "defendant had a firearm which he was exhibiting in a rude, angry, threatening manner, causing reasonable apprehension and fear to [the victim], who was in a vehicle moving on a highway." The charge included that he did not do so in self-defense, and defendant pled guilty. We conclude sufficient evidence supports the trial court's finding.⁵

⁵ The recent amendments to section 4019 do not operate to modify defendant's entitlement to credit, as he had this prior conviction for a serious felony. (§§ 1192.7, subd. (c)(8), 4019, subds. (b) & (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

SIMS, Acting P. J.

HULL, J.